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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1183

BENJAMIN MESSINA and JACK ALWADISH,
Petitioners,

—against—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABRAHAM GLASSER,
52 Eighth Avenue,
New York, New York,

LOUIS KAYE,
185 Montague Street,
Brooklyn, New York,
Attorneys for Petitioners.

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	10
APPENDIX:	
A—Opinion of Court of Appeals	1a
B—Judgment of Court of Appeals	5a
C—Order of Court of Appeals Denying Rehearing	7a

Cases Cited

Costello v. United States, 350 U. S. 359 ..... 3, 8, 10

Lee v. United States (C. A. 9, January 26, 1968) 9fn

Umans v. United States, 386 U. S. 940 ..... 3, 7-10, 10fn

United States Constitution Cited

Fifth Amendment 2, 3

Statutes Cited

18 U.S.C.:

Sec. 2312 ..... 3, 4

Sec. 2313 4

PAGE

28 U.S.C.:

Sec. 1254(1) 2

Other Authorities Cited

2 The Criminal Law Reporter (February 28, 1968):

2406-2407 ..... 9fn

Stern & Gressman, Supreme Court Practice (3rd Ed.):

p. 179 ..... 10fn

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioners jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in his case on January 2, 1968.

Opinion Below

The opinion of the Court of Appeals affirming the convictions of the petitioners is not yet reported; it is printed in Appendix A hereto, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on January 8, 1968 (Appendix B hereto, *infra*). A timely petition for rehearing was entertained and denied by the Court of Appeals on January 31, 1968 (Appendix C hereto, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Were petitioners denied due process of law and the Fifth Amendment right not to "be held to answer for [an] * * * infamous crime, unless on * * * indictment of a grand jury", by the Government's conduct in using before the grand jury, on the indispensable issue of guilt or innocence, the hearsay testimony of an F.B.I. agent instead of the testimony of the indispensable accusing witness himself, Farrah, who was of inordinately poor credibility, so that by the Grand Jury hearsay procedure thus used the Government in effect shielded from the Grand Jury the fact that its case depended on a witness so unconvincing that the Government apparently was afraid to bring him before the Grand Jury and instead brought in a prestigious F.B.I. hearsay witness?

2. Was it not also unfair to deprive the defense of the opportunity to test the trial testimony of the main and indispensable accusing witness, Farrah, with the weapon of Grand Jury testimony by him which should have been available but was not?

3. Were not the petitioners additionally deprived of their aforesaid constitutional right by the unavailability, indeed, of *any* Grand Jury testimony owing to the then practice in the District of Connecticut to refrain from making stenographic minutes of Grand Jury proceedings?

Did not this added aggrieving circumstance put the defense for all practical purposes in a hopeless position for effectively litigating at trial these issues as to credibility of either Farrah or the F.B.I. hearsay witness on the basis of Grand Jury records?

4. In view of the circumstances mentioned in question 3, above, is it fair to subject petitioners to a procedural preclusion or limitation for alleged failure to have sufficiently preserved at trial the contentions concerning the Grand Jury proceedings merely because petitioners' counsel at trial omitted to move to dismiss the indictment on those grounds?

5. Referring to all of the above questions, should certiorari be granted here to reconsider the Grand Jury hearsay rule of *Costello* v. *United States,* 350 U. S. 359, as to which certiorari was granted in *Umans* v. *United States,* 386 U. S. 940, even though the latter writ of certiorari was later dismissed without opinion as improvidently granted? Does not this case afford a proper vehicle for pursuing anew the projected reconsideration of the *Costello* rule which was apparently portended by the granting of certiorari in *Umans?*

Constitutional Provisions and Statutes Involved

The case involves the Fifth Amendment provisions as to due process of law and the right not to "be held to answer for [an] * * * infamous crime, unless on * * * indictment of a grand jury"; it also involves the following statutes:

18 U.S.C. 2312

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than

$5,000 or imprisoned not more than five years, or both."

18 U.S.C. 2313

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Statement of the Case

Petitioners were tried together on several counts of transporting, etc. and selling, etc. stolen motor vehicles in violation of 18 U.S.C. §§ 2312, 2313, and they were both convicted (D. Conn., ZAMPANO, U.S.D.J. and a jury). Each was sentenced to nine years plus concurrent sentences. The United States Court of Appeals for the Second Circuit has affirmed the convictions; this joint petition seeks review of the judgment of the Court of Appeals.

We believe it is undisputed that there could have been no conviction without the testimony of Albert E. Farrah, a Connecticut used car dealer who had previously pleaded guilty to receiving a stolen motor vehicle and who testified that petitioners had sold to him at his lot in Connecticut on several occasions cars which the Government proved had been stolen. Farrah's testimony (R. 174 et seq.) was egregiously lacking in credibility—the Court of Appeals acknowledged in its opinion (Appendix A hereto, *infra*) that "It is true that Farrah's credibility was open to attack", and, interestingly, the Government in its brief in the Court of Appeals also took the unusual step of admitting that the "credibility" of this its main and indispensable witness "was open to attack because of his prior

inconsistent statements and his apparent motive to cooperate with the Government" plus his indicated accomplice status (Appellee's Brief, p. 8). Since the certiorari issues which we here tender are believed to derive their specific impact of constitutional injustice from the extraordinary facts of Farrah's base credibility, it seems proper to note those facts in a little detail:

In the cross examination of Farrah it was shown that the first time he had begun to give information against petitioners was after his plea of guilty to his own indictment in May 1966; for more than a year prior he had consistently told the Federal police that he had no confederates, and that he had not had contemporaneous knowledge of anything illegal in the transactions here involved; during all of that time, prior to his plea of guilty, he had made no mention of the petitioners and indeed he had exculpated them (R. 295-296, 312-323, 329, 338-339, 622-633, 639, 648-649).

Before further describing Farrah's cross examination we think it proper to remark that the record reveals Farrah as a classically "flabby" species of witness, if we may so phrase it. The prosecutor "led" him endemically. Even with such "leading", he was virtually helpless without continual assistance from his "records". Even on direct examination he was pervasively vague about specifying acts or declarations of one or the other particular petitioner herein. Both on direct and on cross examination it appeared that Farrah for all practical purposes was pliably ready to orient his answers along the line of least resistance to the questioner of the moment—denoting that Farrah had little, if anything, by way of a mind of his own or sure factual knowledge of his own concerning those central issues of this case for which his testimony was indispensable to the prosecution. Examples of this

saturate the record of Farrah's testimony. Here are additional examples from Farrah's cross examination:

At R. 296 Farrah told the cross examiner in effect that even now he deems the indictment transactions to have been legal. At R. 302 Farrah told the cross examiner that his memory was "hazy" concerning the transactions involved, and that without the help of documents his memory was "not clear" as to the details of any one transaction, and that even with the documents his memory continued "hazy". At R. 315-330 Farrah told the cross examiner, in essence, that there was nothing particularly suspicious, to his mind, concerning these transactions in their contemporaneous aspect, including the prices he allegedly paid to the defendants.

Additional details are worth noticing as to Farrah's dealings with the F.B.I. agents to whom he finally implicated petitioners after he had pleaded guilty to his own indictment in May 1966. Three agents—Smith, Harrington and Devitt—were involved (R. 306, R. 312). He admitted that out of all the many names of persons with whom he had dealt in his business, he thought that "perhaps" if he gave the names of the present defendants he "would receive some consideration on your sentence", and that "as a matter of fact [he] hoped for that" (R. 308).

Farrah's testimonial pliability—docility or supineness might be the better term—was perhaps most plainly revealed in the prosecutor's redirect examination of his wretched "main witness" (R. 343 et seq.). Effortlessly, the prosecutor swung his obliging witness back, by leading questions, to assertions of contemporaneous knowledge that the vehicles were stolen (R. 343-349, 358, R. 668). And when the witness at one point disappointed the prosecutor by saying that he got this knowledge "eventually" (R. 349), it developed in the next day's testimony on fur-

ther redirect—after admitted over-night coaching of Farrah by the prosecutor (R. 367-368)—that the witness' "firmness" had enjoyed still one more evolutionary leap, indeed a metamorphosis in the image desired by the prosecutor (R. 357-367, with which contrast R. 217-219, 283, 285-286, 302, 304-307, 375-379).

In the defense cross examination of Government witness F.B.I. Agent Clarence L. Smith it was revealed for the first time that the Government had chosen not to use Farrah before the Grand Jury in obtaining the indictment (R. 294-295); and that it was Agent Smith himself who gave the Farrah-derived information to the Grand Jury (R. 625-626). Another important Government witness, probably second only to Farrah in importance, E. John Meslin, an employee of Farrah (R. 432 et seq.), also did not testify before the Grand Jury (R. 442). There was no stenographic Grand Jury Minutes at all in this case.

The trial in this case was held from January 17 to January 31, 1967. On February 27, 1967 this Court granted certiorari in *Umans* v. *United States,* 386 U. S. 940, one of the certiorari questions being "Is grand jury indictment based solely on testimony of government agents who had no personal knowledge, but who briefly summarized affidavits of witnesses who later testified at trial and who were readily available to testify before a grand jury, sufficient?".

Petitioners raised the *"Umans"* grand jury hearsay issue in the Court of Appeals, invoking the "plain error rule", in their main brief in that Court (Point II). In their reply brief in that Court (pp. 2-3) petitioners noted that the Government had announced in its brief (p. 9, fn. 7) that it was no longer using such hearsay procedures in Grand Jury proceedings in the District of Connecticut and that stenographic minutes of Grand Jury proceedings were now at last being taken and preserved in that District;

and that we had heard that also in the Southern District of New York the Grand Jury hearsay practice of using a Government Agent instead of the primary or actual witnesses had been discontinued. The Court of Appeals rejected these arguments of ours because petitioners had not moved in the trial Court for a dismissal of the indictment, and because "the contention itself is untenable", citing *Costello* v. *United States,* 350 U. S. 359, and noting that the writ of certiorari granted in *Umans* had been meanwhile dismissed as improvidently granted (Appendix A hereto *infra*).

Reasons for Granting the Writ

In view of the Court's recent contact with the problem in the *Umans* case, *supra,* we realize that our hopes of obtaining certiorari for revived or renewed consideration of the *Costello* Grand Jury hearsay rule, *supra,* depends on the imponderable (i.e., ponderable only by this Court itself) of whether the *Costello-Umans* question retains certiorari interest for this Court in the event that problem should be presented to the Court in an acceptable factual setting.

This case is believed to present the *Costello-Umans* issue in an especially compelling factual setting because the Government's main and indispensable witness, Farrah, was a witness of such notably weak credibility. As we suggested in our "questions presented", not only was it unfair for the Government to shield from the Grand Jury the fact that its case depended indispensably on a witness so unconvincing that the Government was afraid to bring him before the Grand Jury and instead brought in a prestigious F.B.I. hearsay witness, but it was also unfair to deprive us of the opportunity to probe Farrah's trial testimony with the aid of Grand Jury testimony by him which should have been available but was not. The

capping aggravation of the constitutional injustice here was the practice (now at last discontinued) of refraining from regular stenographic transcription of Grand Jury testimony in the Connecticut District. We did not even have the F.B.I. Agent's grand jury testimony in this case because of lack of stenographic transcription. There is no indication that Farrah himself was unavailable to testify before the Grand Jury. And, of course, absent any Grand Jury stenographic minutes, it can never be known, except *via* ex parte assertions of the Government or of F.B.I. Agent Smith, whether the Grand Jury in this case was informed that it was getting hearsay from the latter Agent.*

In the overall circumstances of this case—the focal and indeed decisive importance of the witness Farrah, plus the hamstringing of the defense through the unavailability of *any* Grand Jury stenographic minutes, and the fact that certiorari was not granted in *Umans* until after this trial—our *"Umans"* point should not be rejected on any doctrine of waiver or preclusion through failure to move for dismissal of the indictment at trial. We therefore respectfully urge that if the Court is receptive to another

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* The Government has not even offered any such assurances in this case, at least it has not done so in any satisfactorily explicit way. On the contrary, the only statements on this subject in the Government's brief in the Court of Appeals (p. 9, incl. fn. 7) are such as to raise a doubt as to whether the Grand Jury was so apprised in this case. Cf. *Lee* v. *United States*, C. A. 9, January 26, 1968, digested in Vol. 2 of *The Criminal Law Reporter*, 2406-2407, February 28, 1968, where similar ambiguous expressions by the Government were disapproved as insufficient in an analogous factual situation.

"Umans"-type certiorari on the *Costello*-hearsay problem,* the present case should be accepted for this purpose with the aid of the "plain error" rule.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
LOUIS KAYE,
Attorneys for Petitioners.

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* We are keenly conscious of the well known idea that it is a fruitless occupation to speculate on the question of why this Court denies—or dismisses as improvidently granted—a writ of certiorari, in the absence of any statement of reasons by the Court itself (Stern & Gressman, *Supreme Court Practice,* 3rd Ed., pp. 179 et seq.). Hence our diffidence in this petition, i.e., we realize full well that nothing we can say can contribute to revival of the *Umans-Costello* certiorari issue if the dismissal of the *Umans* writ meant that the Court has re-evaluated the issue rather than that it dismissed for some imperfection or other unsuitability in the *Umans* record as to this issue.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 209—September Term, 1967.

(Argued November 29, 1967 Decided January 2, 1968.)
Docket No. 31255

UNITED STATES OF AMERICA,

Appellee,

v.

BENJAMIN MESSINA and JACK ALWADISH,

Defendants-Appellants.

Before:

MOORE, SMITH and HAYS,

Circuit Judges.

Appeal from judgments of the United States District Court for the District of Connecticut, Robert C. Zampano, *Judge,* entered on a jury verdict convicting appellants on several counts of transporting and selling stolen motor vehicles in violation of 18 U.S.C. §§2312 and 2313.

Affirmed.

Appendix A

LOUIS KAYE, New York, New York (Abraham Glasser, New York, New York, on the brief), *for Appellants.*

SAMUEL J. HEYMAN, Assistant United States Attorney (Jon O. Newman, United States Attorney for the District of Connecticut, on the brief), *for Appellee.*

HAYS, *Circuit Judge:*

Benjamin Messina and Jack Alwadish were convicted after a jury trial on several counts of transporting and selling stolen motor vehicles in violation of 18 U.S.C. §§2312 and 2313, and they appeal. We affirm the judgments of conviction.

Appellants first challenge the sufficiency of the evidence. The government's principal witness was Albert E. Farrah, a Connecticut used car dealer who had previously pleaded guilty to receiving a stolen motor vehicle. He testified that appellants had sold cars to him at his lot in Connecticut on several occasions. The prices paid for the cars were low, and payment was always in cash. Each car was registered to a different owner; none was registered to appellants. The owners of the cars testified that their cars had been taken from locations in New Jersey and New York shortly before the dates on which they were sold to Farrah in Connecticut.

The jury had the right to infer from evidence of appellants' possession of the cars in Connecticut shortly after their theft from another state that appellants had transported the cars in interstate commerce with knowledge that they were stolen. See *United States* v. *Weldon,* —— F. 2d

Appendix A

—— (2d Cir. October 30, 1967); *United States* v. *DeSisto*, 329 F. 2d 929, 935 (2d Cir.), cert. denied, 377 U. S. 979 (1964).

Appellants, however, assert that Farrah's testimony should not have been believed. It is true that Farrah's credibility was open to attack; he had made several statements to FBI agents before trial which were inconsistent with his trial testimony, he received a reduction in sentence at about the time he began cooperating with government investigators, and it is not unlikely that he was an accomplice in the crimes. On the other hand, his account was plausible and was in part corroborated by the testimony of other witnesses. Farrah's credibility was for the jury to assess; that it chose to believe his testimony presents no ground for appellate reversal.

Appellants urge that the indictment should have been dismissed since it was based in part upon hearsay evidence.[1] Not only did appellants fail to move in the trial court for a dismissal of the indictment, but the contention itself is untenable. See *Costello* v. *United States*, 350 U. S. 359 (1956); *United States* v. *Andrews*, 381 F. 2d 377 (2d Cir. 1967).

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[1] The indictment was returned prior to this court's decision in *United States* v. *Umans*, 368 F. 2d 725 (2d Cir. 1966), cert. dismissed as improvidently granted, 36 U. S. L. W. 3188 (U. S. Nov. 6, 1967), which suggested that the use of hearsay testimony before the grand jury be avoided if possible. Counsel for the government advises us that since the *Umans* decision it has been the practice in the District of Connecticut to present to the grand jury only testimony of witnesses with first-hand knowledge except when such witnesses are unavailable or cannot be summoned without causing them extreme inconvenience.

Appellants also assert that the trial court erred in admitting the actions and declarations of each of them against the other since the indictment charged them with neither conspiracy, aiding and abetting, nor concerted action. This argument is unavailing.

"There need be no charge of conspiracy to make actions and declarations of joint actors in furtherance of a common illegal plan admissible against each actor." *United States* v. *Jones,* 374 F. 2d 414, 418 (2d Cir. 1967).

Appellants argue that the testimony of one Richard Dart should not have been admitted into evidence. (Dart stated that he had issued automobile registrations to Messina without requiring supporting documents in return for small gratuities.) Appellants did not make proper objection to the admission of this evidence in the trial court, and therefore the claim has not been preserved for appeal. *United States* v. *Indiviglio,* 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

Pre-indictment statements by appellants were testified to at trial by a government agent without objection, probably because they were exculpatory. Now appellants claim that these statements were inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436 (1966). Since appellants were not "in custody"—indeed, the interviews were held on a park bench and in a Schrafft's restaurant—*Miranda* warnings were not required. 384 U. S. at 477-78. Moreover, the warnings given were adequate under *Miranda.* The agent omitted mention only of the right of defendants to have appointed counsel if they were indigent. Since appellants retained counsel at trial and on this appeal, they clearly are not indigent and therefore need not have been warned of the right to appointed counsel. 384 U. S. at 473, n. 43. See *United States* v. *Fisher,* —— F. 2d —— (2d Cir. December 15, 1967).

We have examined the other points raised by appellants and find them to be without merit.

Affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of January one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN MESSINA and JACK ALWADISH,

Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

Appendix B

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments and orders of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

Order of Court of Appeals Denying Rehearing

31255

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN MESSINA and JACK ALWADISH,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending petition for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants,

Upon consideration thereof, it is,

Ordered that the petition for rehearing be and it is hereby denied and that the alternative motion to stay the issuance of the mandate and to continue bail pending petition for a writ of certiorari be and it is hereby granted subject to the conditions of Rule 28 of the Rules of this Court.

/s/ LEONARD P. MOORE

/s/ J. JOSEPH SMITH

/s/ PAUL R. HAYS

January 31, 1968.